Loo Cheng Liang v Ban Hin Lee Bank Bhd

HIGH COURT (PENANG) — BANKRUPTCY NO 29–1009–91
EDGAR JOSEPH JR J
27 FEBRUARY 1992

Bankruptcy *— Petition — Validity of creditor's petition — Affidavit verifying petition affirmed after issue of petition — Whether affidavit a condition precedent to issue of petition — Whether petition and subsequent proceedings valid — Whether debtor had waived breach by creditor — Bankruptcy Act 1967 ss 6(1) & 131 — Bankruptcy Rules 1969 r 106 & Form 11*

The judgment creditor lodged a creditor's petition against the judgment debtor on 28 October 1991. The affidavit verifying the creditor's petition was affirmed on 7 November 1991. The judgment debtor although duly served was absent and was unrepresented during the hearing of the petition. The principal question of law to be decided was whether an affidavit verifying the contents of the creditor's petition was a condition precedent to the issue of the creditor's petition and if so, what the effect of non-compliance with such requirement was.

Held, dismissing the creditor's petition:

(1) An affidavit verifying a creditor's petition in the manner prescribed by s 6(1) of the Bankruptcy Act 1967 read with Form 11 prescribed by r 106 of the Bankruptcy Rules 1969, is a condition precedent to the issue of the creditor's petition. In this case, there had been a breach of these provisions because at the date of the issue of the creditor's petition, it was unverified by affidavit.

(2) Section 6(1) of the Bankruptcy Act 1967 and Form 11 as prescribed by r 106 of the Bankruptcy Rules 1969 clothes the registrar with a special and extraordinary jurisdiction to issue proceedings which, if successfully prosecuted to their logical conclusion by the making of a receiving order and an adjudication order, must have grave consequences affecting the status and the entire property of the debtor. The registrar's power to issue a creditor's petition should therefore be very jealously guarded.

(3) In this case when the registrar issued the creditor's petition, there was no material upon which she could exercise her discretion to issue the petition because there was no affidavit verifying the petition. The registrar, in issuing the petition, had accordingly acted without jurisdiction and the petition and all subsequent proceedings were a nullity; the verifying affidavit made after the petition had been issued would not make a difference.

(4) The fact that the judgment debtor although served was absent and was unrepresented, did not mean that he had waived by reason of acquiescence the judgment creditor's breach because consent could not give jurisdiction.

(5) Section 131 of the Bankruptcy Act 1967 applies only to formal defects or irregularities and cannot apply in this case where the whole of the proceedings beginning with the issue of the creditor's petition was a mere nullity.

[Bahasa Malaysia summary

Pemiutang penghakiman telah memasukkan satu petisyen pemiutang terhadap penghutang penghakiman pada 28 Oktober 1991. Afidavit yang mengesahkan petisyen pemiutang itu telah disahkan pada 7 November 1991. Penghutang penghakiman, walaupun petisyen itu telah diserahkan dengan sempurna kepadanya, tidak hadir dan tidak diwakili semasa pendengaran petisyen itu. Soalan undang-undang yang utama yang harus diputuskan ialah sama ada satu afidavit yang mengesahkan kandungan petisyen pemiutang adalah satu syarat terdahulu kepada pengeluaran petisyen pemiutang dan jika demikian, apakah kesan ketidakpatuhan kehendak sedemikian.

Diputuskan, menolak petisyen pemiutang itu:

(1) Satu afidavit yang mengesahkan satu petisyen pemiutang dalam cara yang diperuntukkan oleh s 6(1) Akta Kebangkrapan 1967, dibaca bersama dengan Borang 11 yang diperuntukkan oleh k 106 Kaedah-Kaedah Kebangkrapan 1969, adalah satu syarat terdahulu kepada pengeluaran petisyen pemiutang. Dalam kes ini, terdapat kemungkiran peruntukan-peruntukan ini kerana pada tarikh pengeluaran petisyen pemiutang itu, ianya tidak disahkan oleh satu afidavit.

(2) Seksyen 6(1) Akta Kebangkrapan 1967 dan Borang 11 seperti yang diperuntukkan oleh k 106 Kaedah-Kaedah Kebangkrapan 1969 memberikan pendaftar satu bidang kuasa yang khas dan luarbiasa untuk mengeluarkan prosiding yang, jika didakwa kepada penghabisannya yang lojikal dengan pengeluaran perintah penerimaan dan perintah adjudikasi, tentu membawa kesan-kesan yang serius yang menjejaskan status dan keseluruhan harta penghutang. Kuasa pendaftar untuk mengeluarkan petisyen pemiutang oleh itu harus dijaga dengan terperinci.

(3) Dalam kes ini, apabila pendaftar mengeluarkan petisyen pemiutang, tidak ada material yang atasnya beliau boleh menjalankan budi bicaranya untuk mengeluarkan petisyen itu kerana tidak ada afidavit yang mengesahkan petisyen itu. Pendaftar, dalam mengeluarkan petisyen itu, oleh itu telah bertindak tanpa bidang kuasa dan petisyen itu bersama kesemua prosiding yang menyusulinya adalah terbatal; dan afidavit yang mengesahkan petisyen itu selepas ianya dikeluarkan tidak akan membawa apa-apa perbezaan.

(4) Fakta bahawa penghutang penghakiman, walaupun petisyen itu telah diserahkan kepadanya, tidak hadir dan tidak diwakili, tidak bermakna bahawa beliau telah melepaskan kemungkiran pemiutang penghakiman melalui akuiesens kerana persetujuan tidak boleh memberi bidang kuasa.

(5) Seksyen 131 Akta Kebangkrapan 1967 terpakai cuma kepada kecacatan formal atau luar aturan dan tidak boleh terpakai dalam kes ini di mana keseluruhan prosiding, bermula dengan pengeluaran petisyen pemiutang, adalah sesuatu yang terbatal semata-mata.]

Cases referred to

1 *Re Sanders* (1894) 63 LJQB 734; 71 LT 236 (folld)
2 *Ex p Lindsay* (1874) LR 19 Eq 52; 31 LT 415 (folld)
3 *Re Daunt* (1905) 5 SR (NSW) 533 (folld)
4 *Anon* (1861) 5 LT 527 (folld)
5 *Re Nicol* (1902) 22 NZLR 129 (folld)
6 *Re A Debtor (No 7 of 1910)* [1910] 2 KB 59 (refd)
7 *Au-Yong v Dicum & Anor* [1963] MLJ 349 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 5(1)(c), 6(1), 131
Bankruptcy Rules 1969 rr 106, 108, Form 11
Bankruptcy Act 1898 (NSW) [Aust] ss 6, 8
Bankruptcy Act 1892 [NZ] ss 38, 39

Loo Cheng Liang (judgment debtor) in person.
Yiew Voon Jin (*Goh Eng Kee & Co*) for the judgment creditor.

Edgar Joseph Jr J: The principal question of law which arises for decision in the present case is whether an affidavit verifying the creditor's petition as required under s 6(1) of the Bankruptcy Act 1967 is a condition precedent to the issue of the creditor's petition by the court; if so, what is the effect of non-compliance?

In this judgment, unless the context otherwise requires, all references to sections and to rules are to those of the Bankruptcy Act 1967 and the Bankruptcy Rules 1969 respectively.

The facts out of which the above points of law arise may be briefly stated. The creditor's petition had been lodged on 28 October 1991 at the Registry of the High Court, Penang, for the adjudication in bankruptcy of the debtor, a Mr Loo Cheng Liang by the petitioner's agent, a Mr Lim Boo Thiam, and purported to have been verified by affidavit affirmed on 7 November 1991 under s 6(1) and in the form prescribed by r 106 being Form 11.

The registrar had on 2 November 1991 purported to issue the creditor's petition although there was not then an affidavit verifying its contents. Some five days later, however, an attempt was made to verify the same.

The affidavit verifying the creditor's petition runs as follows:

> Affidavit of truth of the statements in application
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> I, Lim Boo Thiam c/o Ban Hin Lee Bank Bhd of address unit G01 Sub-Centre Komplex, Medan Mayangpasir, Bandar Bayan Baru, 11950 Bayan Lepas, Pulau Pinang, a representative of the petitioning company make affirmation and say as follows:

1 I have been duly authorized to make this affidavit.
2 That every statement in the said petition is true and within my personal knowledge.
3 The petitioner Ban Hin Lee Bank Bhd has not received payment to account as regards the debt referred to in para 2 of the creditor's petition in this matter since the date of the aforesaid petition.

Affirmed on 7 November 1991 at Penang.

Before me,
sgd Paul Thong, PJK
Commissioner of Oaths, Malaysia
No (329)

In *Re Sanders*,[1] Vaughan Williams J said: 'It is a condition precedent to the right to file a petition that there should be an affidavit of verification.'

In *Ex p Lindsay*[2] Bacon CJ said, when referring to the verifying affidavit, 'the reason for requiring that affidavit to be made is that it would not be right that the petition should be received by the registrar without it'.

At the time the cases of *Re Sanders*[1] and *Ex p Lindsay*[2] were decided in England, the Bankruptcy Act 1883 was in force and both it and the rules made thereunder contained provisions the same as s 6(1) of our Act and r 106.

In the Australian case of *Re Daunt*,[3] Walker J, after referring with approval to the passages in *Sanders*[1] and *Ex p Lindsay*[2] quoted above, held that a petition was presented when it was filed and was not validly presented unless and until it has been filed together with a verifying affidavit. In so holding, the learned judge referred to ss 6 and 8 of the Bankruptcy Act 1898, then in force. Section 6 (equivalent to our s 5(1)(c)) provided that a creditor shall not be entitled to present a bankruptcy petition unless the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition. Section 8 (equivalent to our s 6(1)) declared (1) that a creditor's petition shall be verified by affidavit of the creditor or some person on his behalf having knowledge of the facts and served in the prescribed manner; (2) that at the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy. His Lordship concluded, at p 538 para 2, that 'the joint effect of them (ss 6 and 8) is that a creditor's petition *must* be verified on presentation' (emphasis provided).

In *Anon*,[4] the debtor, a prisoner in Winchester gaol, had presented a petition for an adjudication of bankruptcy against himself. The usual affidavit verifying the truth of the allegations therein was not annexed thereto, and in consequence the chief registrar declined to receive it. The matter was then mentioned to Mr Registrar Winslow, and it was contended before him that there was nothing in the Bankruptcy Act 1861 or the general orders promulgated in pursuance thereof, requiring any such affidavit except in pauper cases.

The registrar admitted that that was so, but intimated his opinion that the petition was rightly rejected on the ground that the affidavit referred to was required by s 89 of the Consolidation Act 1849 which was not repealed by the Bankruptcy Act 1861, and that the Acts were, by s 232 of the latter Act, to be read together as one Act.

Accordingly, I am amply satisfied that an affidavit verifying a creditor's petition in the manner prescribed by the peremptory s 6(1) of our Act read together with Form 11 prescribed by r 106, is a condition precedent to the issue of a creditor's petition. In the present case, upon the facts, there had been a clear breach of those provisions for, at the date of the issue of the creditor's petition, it was unverified by affidavit.

The next question which arises for decision is what the effect of non-compliance with the requirement that a creditor's petition must be verified upon presentation is.

In my view, once it is accepted that verification of a creditor's petition in the manner prescribed by the peremptory s 6(1) read together with Form 11 prescribed by r 106 is a mandatory requirement and therefore a *condition precedent* to the issue of a creditor's petition, it must follow that the registrar, in issuing the creditor's petition herein, had acted without *jurisdiction* and it and all subsequent proceedings were a nullity.

I am supported in this by the New Zealand case of *Re Nicol*[5] which was decided on s 38 of the Bankruptcy Act 1892 (similar to our s 6(1)). In that case, there was no affidavit verifying the petition at the time of the issue of the summons, pursuant to s 39 of the Bankruptcy Act 1892 and thus, there being no evidence before the court of the truth of the statements in the petition, it was held that there was no jurisdiction to issue the summons. Williams J said, inter alia, this at p 130:

> I think that there can be no doubt, looking at the provisions of ss 38 and 39, that the due verification of a petition is a condition precedent to the issue of a summons out of the court. The case of *In re Sanders* 71 LT 236; 63 LJQB 734, which was decided on a somewhat similar section of the English Act, indicates that the filing of the affidavit is a condition precedent to the reception of the petition. If that is so, then it follows that the registrar of the court in issuing the summons was acting without jurisdiction. If he was acting without jurisdiction, then the subsequent proceedings are necessarily a nullity, unless there is something in the Act which enables the bankruptcy court to set them up again.

Apart from authority, it seems to me that the language of our s 6(1) and Form 11 prescribed by r 106, clothes the registrar with a special and extraordinary jurisdiction to issue proceedings which, if successfully prosecuted to their logical conclusion by the making of a receiving order and an adjudication order, must have grave consequences affecting as they do the status and the entire property of the debtor. It is not difficult to cite an anthology of cases for this proposition but it will suffice if I refer to just one of them. In *Re A Debtor (No 7 of 1910),*[6] Fletcher Moulton LJ said at p 66:

> Now proceedings in bankruptcy are of course not actions, but in my opinion what the petitioner seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status carrying with it grave disqualifications, ...

And, on the same page, Farwell LJ said:

> ... I agree with Fletcher Moulton LJ that an adjudication of bankruptcy involves very grave disqualifications. Under s 32 of the Bankruptcy Act 1883, a bankrupt cannot sit in the House of Lords, or House of Commons, he cannot act as a justice of the peace, he cannot be a mayor ...

And, also on the same page, Buckley LJ said: '... proceedings in bankruptcy are in the nature of penal proceedings inasmuch as they result or may result in an alteration of the debtor's status'. A

The power conferred upon the registrar to issue a creditor's petition is therefore one that should be very jealously guarded, and the legislature, I have no doubt, had intended that no creditor's petition should issue against a debtor until and unless the registrar has satisfied himself that there is a prima facie case to do so. The 'Affidavit of truth of statements in the petition' prescribed by r 106 for purposes of verifying the creditor's petition is, as Vaughan Williams LJ put it in *Re A Debtor*[6] at p 62: B

> ... in effect is an affidavit for the purpose of getting leave to file a petition in bankruptcy. It is not so called, but that it is so in substance is quite plain. The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition. C

When, therefore, as here there was no affidavit verifying the creditor's petition at the date when the registrar issued the creditor's petition, there was no material upon which she could exercise her discretion to issue the creditor's petition. Rule 108 emphasizes the need for the exercise of such discretion for it provides that after the presentation of a creditor's petition and before sealing the copies of the petition for service the statements in the petition shall be investigated by the registrar and where some of the statements in the petition cannot be verified by affidavit witnesses may be summoned to prove the same. The registrar therefore does not act as a mere rubber stamp. D E

There are two further points which arise. First, the debtor in this case although duly served was absent and was unrepresented. Could it be said therefore that the objections referred to above had thereby been waived by reason of acquiescence? Clearly no, for consent cannot give jurisdiction. F

If I am correct in holding that the registrar's jurisdiction never attached owing to the absence of the accompanying verifying affidavit as required by s 6(1) and Form 11 prescribed by r 106, then the whole of the proceedings beginning with the issue of the creditor's petition and everything else which followed, were mere nullities, so that no verifying affidavit which purports to have been made under r 106 *after* the creditor's petition had been issued, would make the slightest difference. G

Secondly, can the creditor have recourse to s 131 of the Act which reads:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court. H

In my view, having regard to my conclusion that the whole of the proceedings beginning with the issue of the creditor's petition was a mere nullity, s 131 which applies only to formal defects or irregularities can have no application. As Thomson CJ said in *Au-Yong v Dicum & Anor*[7] at p 351 col 2F & G: I

> In relation to the application of s 131 of the Bankruptcy Ordinance there are two questions to be considered.

A The first is whether what is complained of is an irregularity. If any non-compliance with the requirements of the law goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity that is, of course, the end of the matter and the section has no application. If there is only an irregularity the second question is whether the court is of opinion that in consequence 'substantial injustice has been caused'.

B Even more to the point is what Williams J said in the case of *Re Nicol*[5] at pp 130–131:

... The case of *In re Sanders* 71 LT 236; 63 LJQB 734, which was decided on a somewhat similar section of the English Act, indicates that the filing of the affidavit is a condition precedent to the reception of the petition. If that is so, C then it follows that the registrar of the court in issuing the summons was acting without jurisdiction. If he was acting without jurisdiction, then the subsequent proceedings are necessarily a nullity, unless there is something in the Act which enables the bankruptcy court to set them up again. The only section in the Act which, to my mind, could give the court that power is s 166. I do not think, after due consideration of that section, this is a case in which the court could amend D or in which the court could rectify the omission. I do not think the provisions of s 166 are in substance different from those of s 143 of the English Act. I think the meaning of s 166 of our Act is that defects which are formal can be remedied, but that the court ought not under it to remedy defects of substance. It seems to me that where the jurisdiction of the court to bring the alleged bankrupt before the court by summons depends, by the terms of the statute, on certain things E being previously done, and those things are not done, the basis of the jurisdiction is swept away. I think that the observations of Chief Justice Bacon in the case of *Ex p Coates, In re Skelton* 31 LT 415 apply to cases of this kind. He says, 'It is the very gist and essence of the Bankruptcy Act that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act'. Those are observations F that, it seems to me, apply in the present case. If a creditor does not do what the Act requires him to do, he cannot ask the court to allow him the benefit of the Act.

In the result, the petition is dismissed. However, I make no order as to costs as the debtor was unrepresented and did not raise any opposition to the G petition.

Creditor's petition dismissed.

Reported by Wong Kian Kheong

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